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January 2, 2013

**Via Email**

National Freedom of Information Office  
U.S. Environmental Protection Agency  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
hq.foia@epa.gov

Re: Request Number 08-FOI-00114-12  
Appeal of EPA Response

Dear Sir or Madam:

This letter and the exhibits submitted herewith constitute an appeal of EPA's December 3, 2012 response to Consolidated Freedom of Information Act ("FOIA") Request Number 08-FOI-00114-12 made on behalf of Encana Oil & Gas (USA) Inc. ("Encana") by this firm.<sup>1</sup> Exhibit 1. EPA's response is incomplete and inadequate. EPA should be required to produce additional records, as discussed below.

**I. FACTUAL BACKGROUND**

On December 8, 2011, EPA Region 8 and EPA's Office of Research and Development ("ORD") issued a draft report entitled, "Investigation of Ground Water Contamination near

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<sup>1</sup> This appeal also includes the hard drive that this firm sent to you on December 31, 2012 that was delivered to you on January 2, 2013.

Pavillion, Wyoming” (“Draft Report”).<sup>2</sup> The Draft Report summarizes and evaluates the results of four rounds of groundwater monitoring (Phases I-IV) in the area of historic and ongoing oil and gas production known as “Pavillion Field,” approximately two miles east of the town of Pavillion, Wyoming. The Draft Report concludes that gas production activities, including hydraulic fracturing in Pavillion Field, have contaminated ground water and likely enhanced gas migration at and below depths used for domestic water supply. Draft Report, p. 39.

On December 14, 2011, EPA noticed a 45-day comment period on the Draft Report. 76 *Fed. Reg.* 77829. Since then, EPA has extended the comment period three times, most recently through January 15, 2013. 77 *Fed. Reg.* 62234.

In December 2011, Encana submitted four FOIA requests to EPA, soon after the Draft Report was released, seeking information critical to an informed review of the Draft Report and its conclusions. Exhibit 2. Separate requests were sent to EPA Region 8, EPA ORD, EPA Region 3, and EPA’s Robert S. Kerr Environmental Research Center. *Id.* EPA consolidated those four FOIA requests (“Consolidated Requests”) and assigned the above-referenced FOIA tracking number. The Consolidated Requests seek data, associated information, and communications concerning the Draft Report and EPA’s activities in Pavillion Field. *Id.* These records are important to evaluate the Draft Report – both for the submittal of public comments and for the promised peer review.

EPA delayed providing any estimated date for producing the requested records for approximately two months. Then, on February 16, 2012, EPA demanded pre-payment of

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<sup>2</sup> The Draft Report, which is voluminous, is incorporated by reference in this appeal. The Draft Report is available to EPA and is posted on EPA Region 8’s website for Pavillion. [http://www.epa.gov/region8/superfund/wy/pavillion/EPA\\_ReportOnPavillion\\_Dec-8-2-11](http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2-11). Other administrative record documentation referenced in this submittal is also incorporated by reference and available to EPA.

\$114,360 -- before it would begin its search and review process to respond to the Consolidated Requests -- and stated that EPA estimated that it would take six months from the time of pre-payment for EPA to provide a complete response. Under protest, after futile efforts to understand the rationale for the pre-payment amount or to ensure that EPA would maintain records sufficient to document that EPA would not, inappropriately, charge Encana for certain activities,<sup>3</sup> Encana made the \$114,360 on March 27, 2012. Exhibit 3. EPA's complete response then was expected on September 27, 2012. Despite repeated requests by Encana that EPA produce responsive documents on a rolling basis, EPA refused to do so -- without any explanation. On September 27, 2012, EPA did not produce any responsive documents at all. Instead, EPA advised that it would not complete its response until early December, only weeks before the close of the public comment period on the Draft Report. Exhibit 4. On December 3, 2012, EPA finally provided records, a list of withheld records (the "Non-Disclosure List")<sup>4</sup> and a letter stating that EPA's response to the Consolidated Requests is final agency action.<sup>5</sup> EPA's response to the Consolidated Requests is incomplete and substantial problems exist with the Non-Disclosure List. As a result, Encana files this appeal.

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<sup>3</sup> E.g., for producing to Encana records previously requested by others and for producing to Encana again records posted on EPA's Pavillion website.

<sup>4</sup> The Non-Disclosure List identifies records that EPA has withheld on the bases of various exemptions under FOIA. These exemptions are also referred to as privileges. The List is what is often called a privilege log or a *Vaughn* index. *Vaughn v. Rosen*, 484 F.2d 820, 824-25 (D.C. Cir. 1973).

<sup>5</sup> EPA's sudden decision that its response was final agency action was entirely inconsistent with EPA's and Encana's agreement that Encana would accept a Non-Disclosure List first, followed by EPA's producing redacted records. Exhibit 5. Encana never agreed to, and EPA had never discussed with Encana, EPA's declaring its actions to be final agency action before EPA provided redacted documents in compliance with FOIA requirements.

**II. EPA FAILED TO PROVIDE OBVIOUSLY RESPONSIVE RECORDS AND FAILED TO PROVIDE OTHER RESPONSIVE RECORDS IN PROPER FORMAT.**

EPA withheld or has otherwise not provided records that, by law, obviously must be produced. EPA provides no basis for withholding these records (they are not identified in EPA's Non-Disclosure List)<sup>6</sup> and no credible ground exists for non-disclosure.

**Mass Spectrometry Data from Region 3 and Shaw:** EPA still has not provided the mass spectrometry data from Region 3 or Shaw (one of EPA's contractors) for Phases IV and V.<sup>7</sup> These data are critical to EPA's conclusion in the Draft Report. EPA did not list these data on its Non-Disclosure List, and there would be no basis for withholding these records in any event. What is clear from the data that has been provided, and is important to public understanding and comment on the Draft Report, is that there are serious Quality Assurance/Quality Control deficiencies associated with the mass spectrometry data from all phases of EPA's sampling. Given what is known, there is reason to believe that the remaining, yet to be produced, mass spectrometry data will be similarly flawed. EPA should be required to produce these records.

**Contract Laboratory Program ("CLP") Data Packages:** EPA has also failed to produce any CLP data packages for its investigation. EPA requires that these data packages, as a matter of course, including various types of documentation identified in EPA Guidance

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<sup>6</sup> EPA committed to advise Encana promptly if any of the requested records do not exist. EPA has not done so for any records requested. Exhibit 6 ("If EPA determines that a record Encana requested does not exist, EPA will inform Encana in writing as soon as practicable that the record does not exist.")

<sup>7</sup> On August 14, 2012, Encana submitted another FOIA requests to EPA seeking particular information specific to Phase V ("Phase V FOIA Requests"). Some overlap exists between the Consolidated Requests and the Phase V FOIA Requests. EPA has not produced the Phase V mass spectrometry data in response to either requests. Encana will separately file its appeal to EPA's response to the Phase V Requests on January 3, 2013.

documents. These records, like the mass spectrometry data, are important to evaluation of the legitimacy, validity, and reliability of the data. EPA's continued failure to produce these standard data packages is inexplicable. EPA should be required to produce these records.

**Method Development Records:** In addition, EPA failed to produce critical records on its development of non-standard analytical methods that EPA used. Method development documents are crucial to documenting the validity, reliability and other aspects of an analytic procedure and the generated data. If no such records exist, then EPA's use of non-approved methods and reliance on data generated with these methods is a serious scientific flaw in the Draft Report. Method development requires at least the following documentation, none of which have been produced by EPA: method validation studies, method detection limit studies, accuracy and precision data studies. EPA should be required to produce these records.

**Native Files and Format That Can Be Manipulated:** EPA is required to produce records in their original or native form and in a format that can be manipulated. White House Memorandum For the Heads of Executive Departments and Agencies, January 21, 2009 ("WH Memorandum"). Encana explicitly requested that EPA produce its records both in their native format and in form that can be manipulated. Exhibit 2. EPA failed to comply with the WH Memorandum. Instead, EPA took Excel files (their native format) and converted them into pdf files which cannot be manipulated.<sup>8</sup> Exhibit 7. EPA also converted all emails into pdf format. Doing so precludes manipulation of the information as required in the WH Memorandum and makes meaningful review unnecessarily labor intensive and costly. EPA

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<sup>8</sup> EPA did produce a small fraction of records in Excel format.

should be required to produce the responsive records in native format, in a form that can be manipulated.

**Produced Redacted Records:** EPA redacted hundreds of records and produced them without any explanation of the type of information redacted or the bases for the redactions. The Non-Disclosure List contains no references to redacted records. EPA should be required to provide either unredacted copies of these records or a list of the redacted records, with the basis for each redaction.

**Withheld Records That EPA Must Produce with Limited Redaction:** FOIA requires that the government provide “any reasonably segregable” information. 5 U.S.C. §552(b). Under FOIA, an agency must make public “as much information as possible.” *Lykins v. U.S. Dept. of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984). EPA must provide a “detailed justification” for why portions of a record cannot be segregated for production. *Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citing *Mead Data*, 566 F.2d at 260 (“an agency cannot justify withholding an entire document simply by showing that it contains some exempt material”)). EPA entirely ignored this requirement and has withheld hundreds of records which, from the Non-Disclosure List descriptions, clearly contain reasonably segregable, non-exempt information. EPA should be required to produce all such records with exempt material redacted, and examples are of them discussed below.

**Unreadable Records:** EPA produced many records that EPA’s conversion process rendered unreadable. *See, e.g., Exhibit 8*. EPA should be required to review its production for such records and produce these records in a readable form.

**III. EPA IMPROPERLY INVOKES VARIOUS FOIA EXEMPTIONS IN AN ATTEMPT TO SHIELD THOUSANDS OF RECORDS FROM DISCLOSURE.**

EPA's Non-Disclosure List contains over 83,000 entries – the vast majority of which are without legal basis for non-disclosure. EPA's descriptions of thousands of these entries are inadequate to support the exemption claims. EPA withheld 20,697 records on the sole basis of privacy and 35,827 records solely based on DPP. The Non-Disclosure List is inaccurate and arbitrary and capricious. EPA should be required to review the list, provide a revised Non-Disclosure List, and produce all of the records that it withheld without legitimate legal basis.

**A. EPA Has the Burden of Demonstrating that a FOIA Exemption Applies.**

FOIA expressly places the burden on EPA to demonstrate that one of the statute's nine exemptions is applicable and justifies its decision to withhold a record that is responsive to Encana's FOIA requests. 5 U.S.C. § 552(a)(4)(B). "In considering whether information should be disclosed, two guiding principles apply. First, FOIA is to be broadly construed in favor of disclosure. Second, its exemptions are to be narrowly circumscribed." *Trentadue v. Integrity Comm.* 501 F.3d 1215, 1226 (10th Cir. 2007) (internal citations omitted).

EPA must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King v. U.S. Dept. of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987) (citing *Mead Data*, 566 F.2d 242)); accord *Roth v. U.S. Dept. of Justice*, 642 F.3d 1161, 1185 (D.C. Cir. 2011) ("agencies [] must provide a specific, detailed explanation of why the exemption applies to the withheld materials"). "[S]pecificity is the defining requirement" to permit "adequate adversary testing of the agency's claimed right to an exemption," and, if

necessary, enable a reviewing court “to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves.” *King*, 830 F.2d at 218-219; *accord Fiduccia v. U.S. Dept. of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999); *Church of Scientology Int'l v. U.S. Dept. of Justice*, 30 F.3d 224, 230 (1st Cir. 1994) (cursory index insufficient). EPA cannot satisfy this burden by offering “conclusory” explanations for its decision to withhold a record. *Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 250 (D.C. Cir. 1977) (citing *Vaughn v. Rosen*, 484 F.2d 820, 824-25 (D.C. Cir. 1973)).

**B. EPA Failed to Provide Any Information To Support Non-Disclosure of Over 5,000 Records.**

EPA’s privilege log lists 3,000 records identified only by a number followed by .pdf. For example, “123456.pdf.” There is absolutely no basis on which to evaluate the legitimacy of EPA’s claims for withholding those records. Exhibit 9. EPA also withheld thousands of records with very little additional identifying information and, thus, EPA’s claimed bases for withholding them cannot be supported. Exhibit 10. EPA should be required to produce the records listed on Exhibits 9 and 10.

**C. EPA Improperly Withheld Records On the Basis of Privacy.**

FOIA Exemption 6 protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). “Similar files” refers to “detailed Government records on an individual which can be identified as applying to that individual.” *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1232-33 (10th Cir. 2007) (citing *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982)). Given this purpose, and recognizing that FOIA exemptions should be narrowly construed, courts typically uphold a privacy claim under



Exemption 6 for the *limited* purpose of protecting specific personal information such as home addresses, place of birth, and employment history. *See, e.g., Forest Guardians v. U.S. Fed. Emergency Mgmt. Agency*, 410 F.3d 1214, 1219 (10th Cir. 2005). Specific and narrowed redaction of such information is often appropriate and mandated. *Trentadue*, 501 F.3d at 1234. Moreover, once a person's identity is known, the privacy interest in exempting identifying information ceases to exist. *Id.* at 1234.

In determining whether the release of personal identifying information would "constitute a clearly unwarranted invasion of personal privacy," courts balance "the public interest in disclosure against the privacy interest Congress intended the exemption to protect." *Id.* at 1233 (quoting *Forest Guardians v. FEMA*, 410 F.3d 1214, 1217 (10th Cir.2005)). The public interest is measured as the extent to which disclosure would contribute to the "public understanding of the operations or activities of the government." *Id.* (citing *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 495, (1994)). "If there is an important public interest in the disclosure of information and the invasion of privacy is not substantial, the private interest in protecting the disclosure must yield to the superior public interest." *Forest Guardians*, 410 F.3d at 1218 (citing *Alirez v. NLRB*, 676 F.2d 423, 426 (10th Cir. 1982)).

**1. Records Reflecting EPA Employees' Use of Non-Official Email Addresses:**

On December 13, 2012, the EPA Office of Inspector General ("IG") advised the EPA Administrator and the Regional Administrators (among others) that it planned to "begin an audit of certain EPA electronic record management practices" in order "to determine whether EPA follows applicable law and regulations when using private and alias email accounts to conduct

official business.” Exhibit 11. The specific issues are whether the use of alias or personal email accounts by EPA employees violates the Federal Records Act or is to avoid FOIA obligations.

Only ten days earlier, EPA provided its Non-Disclosure List for the Consolidated Requests, withholding numerous records because they contain EPA employee alias email addresses, personal email addresses, or both. EPA asserts that those addresses are protected by FOIA’s privacy exemption.<sup>9</sup> The privacy exemption does not protect these emails from disclosure. EPA should immediately produce all emails using EPA alias email addresses or EPA employees’ personal email addresses,<sup>10</sup> including those on Exhibit 12. In addition, the IG investigating potential violations of the FRA should include EPA employees’ use of both alias and personal email accounts in connection with Pavillion Field.

## **2. Resident Complaints About Domestic Well Water:**

The Draft Report states that EPA initiated the Pavillion Field investigation “[i]n response to complaints by domestic well owners regarding objectionable taste and odor problems” in domestic water wells. Draft Report at iv. The Draft Report includes among its “lines of evidence” supporting its conclusions the following: “[C]itizens’ complaints of taste and odor problems concurrent or after hydraulic fracturing are internally consistent.” *Id.* at 39. In other words, EPA relied on what certain residents in Pavillion Field said about their water and about when the complaints arose.

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<sup>9</sup> EPA often asserts more than one exemption for having withheld a record. For documents listed on the exhibits attached to this appeal and for which Encana seeks production, none of the claimed exemptions protect the records from production.

<sup>10</sup> Redaction in the personal emails of only the domain name (e.g., @gmail.com) sufficiently protects the privacy of an employee’s personal email addresses.

EPA provided many records that identify the well numbers, the well owners, and the addresses of the wells that it sampled, and the names and personal email addresses of area residents. *See, e.g., Exhibit 13.* In the Draft Report “Acknowledgements,” EPA expresses its appreciation to four specifically named domestic well owners. Draft Report at iv. Under a section titled “Citizen Complaints” on EPA’s Pavillion website, EPA posted a letter one well owner to President Obama; a newspaper article in which several domestic well owners and users are named; and a PowerPoint presentation by the Powder River Basin Resource Council (“PRBRC”) that includes photographs and statements about domestic well issues identifying specific individuals. *Exhibit 14.* Landowner names and their complaints about domestic well water are not protected by privacy.

EPA, however, withheld dozens of records containing this already public information. EPA also withheld records about the timing and specifics of the resident complaints on which EPA relies for its conclusions in the Draft Report. EPA’s conduct is the antithesis of scientific transparency and is without legal basis.

Accordingly, EPA should be required to produce, at a minimum, all of the records listed in *Exhibit 15.*<sup>11</sup>

### **3. Communications with Third-Parties**

EPA has also withheld, on privacy grounds,<sup>12</sup> many records about and of communications between EPA and Deb Thomas, who has been identified in the press as “an organizer for the

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<sup>11</sup> See footnote 9.

<sup>12</sup> See footnote 9.

Pavillion Area Concerned Citizens” and who is also acts on behalf of the PRBRC,<sup>13</sup> and records summarizing information provided by and to Ms. Thomas. Exhibit 16. EPA also has numerous records summarizing the information provided by and to Ms. Thomas, who has communicated with EPA, the press, and members of the public about specific domestic well owners and their domestic water well issues. *Id.* EPA should be required to produce all records to, from or concerning Ms. Thomas, who is a public figure. As a result, these records and others to with or concerning third-parties are not subject to privacy and EPA should be required to produce them.

**4. Review of Draft Report Manuscript:** In September and October 2011, EPA contacted four individuals outside EPA and one EPA employee to review the manuscript of the Draft Report. EPA corresponded with them, acknowledged their assistance in the Draft Report,<sup>14</sup> and revealed the external reviewers’ names to Congress, thereby making those names public. Exhibit 15. In response to the Consolidated Requests, EPA identified the internal reviewer and also a fifth external reviewer, who apparently conducted his review in December 2011. EPA produced two of the Technical Manuscript Review Forms for this review, as well as letters and memoranda to and from these reviewers. Exhibit 17. Yet, EPA also withheld many records to, from or concerning these reviewers, and their comments on the Draft Report manuscript, including the remaining Review Forms, on the basis of privacy (and for some records on the basis of deliberative process privilege (“DPP”). EPA’s withholding these records is not supportable under privacy or any other FOIA exemption. EPA should immediately produce the

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<sup>13</sup> See Exhibit 14.

<sup>14</sup> In the Draft Report, EPA acknowledged “valuable comments” from the reviewers that EPA said it “used to improve the manuscript.” One of the three possible external reviewers EPA initially contacted did not agree to participate and a different (fourth) external reviewer was contacted and did the work.

records involving Drs. Stephen Osborn, Jennifer McIntosh, Aver Vengosh, Michael Overbay, and Michael Barcelona<sup>15</sup> including those listed on Exhibit 18.<sup>16</sup>

**5. Access and Other Databases:** EPA withheld multiple databases, including 14 Microsoft Access databases (which have file suffixes of .mdb), asserting privacy. Exhibit 19.<sup>17</sup> Access is a software package used for very large sets of information, in this case including analytical data, with functionality and manipulability that extends far beyond Excel or other simply software. Access databases can be “queried” for information using many different criteria, with the search results organized in many different formats. EPA has no basis for withholding these data-rich databases and should be required to produce them.

**6. Field Notes:** On its Pavillion website, EPA has posted some of the field notes prepared by EPA and contract employees who conducted the field investigation. However, inconsistently, EPA has also withheld other field notes on the basis of privacy. Field notes are not private; they are instead the most basic documentation supporting ground water or other environmental sampling. EPA should be required to produce the field notes, including those on Exhibit 20.<sup>18</sup>

**D. EPA Improperly Withheld Records on the Basis of Attorney Client Privilege.**

The attorney-client privilege (“ACP”) protects “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional

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<sup>15</sup> EPA withheld Dr. Barcelona’s comments on the further basis of attorney-client privilege even though no attorney is listed. The individuals identified on EPA’s Non-Disclosure List in connection with Dr. Barcelona’s comments -- David Ostrander, Gilberto Irizarry, and Eugene Lee -- are all technical employees of EPA and not lawyers.

<sup>16</sup> See footnote 9.

<sup>17</sup> See footnote 9.

<sup>18</sup> See footnote 9.

advice.” *Id.* at 252. In the FOIA context, the agency is the “client” and the agency’s lawyers are the “attorneys” for the purposes of attorney-client privilege. *Judicial Watch, Inc. v. U.S. Dept. of Treasury*, 802 F. Supp. 2d 185, 200 (D.D.C. 2011) (citing *In re Lindsey*, 148 F.3d 1100, 1105 (D.C.Cir.1998)). To satisfy its burden, EPA “must show that the withheld document (1) involves confidential communications between an attorney and his client and (2) relates to a legal matter for which the client has sought professional advice.” *Id.* (citing *Wilderness Soc’y v. U.S. Dep’t of the Interior*, 344 F.Supp.2d 1, 16 (D.D.C. 2004) (internal quotations omitted). “The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). The privilege extends only to communications between attorneys and “agents or employees of the organization who are authorized to act or speak for the organization *in relation to the subject matter of the communication.*” *Mead Data*, 566 F.2d at 253, fn. 24 (emphasis added).

To support a claim of ACP, EPA must demonstrate in each case that the purpose of the communication is seeking or obtaining legal advice between an attorney and a client. Disclosure of ACP material to someone who is not part of the attorney-client relationship results in waiver. EPA improperly withheld hundreds, if not thousands, of records including many in the following categories on the basis of ACP:

- a. Records for which EPA failed to provide sufficient information to demonstrate that the record is ACP;
- b. EPA communications with Congress;
- c. EPA communications with and about the press;

- d. EPA communications with residents in the Pavillion area or with individuals acting on those individuals' behalf; and
- e. EPA communication with other non-EPA third parties.

None of these records are protected by the attorney-client privilege. EPA should be required to produce, at a minimum, the records listed in Exhibit 21<sup>19</sup> and all other records improperly withheld as attorney client privilege.

**E. EPA Improperly Withheld Records as Attorney Work Product.**

The work-product doctrine is limited in scope and only protects materials “prepared *in anticipation of litigation or for trial* by or for another party or by or for that other party's representative.” *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) (emphasis added) (citing Fed. R. Civ. Proc. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947)). The fact that an attorney drafted a document does not, by itself, justify protection. *Zander v. Dep't of Justice*, 2012 WL 2336244 (D.D.C. June 20, 2012) (citing *Senate of the Commonwealth of P.R. v. Dep't of Justice*, 823 F.2d 574, 586–87 (D.C.Cir.1987)) (documents drafted by agency counsel improperly withheld under FOIA because they were not made in “preparation” for litigation and merely summarized the case very generally in lay terms).

EPA withheld many records on the basis of attorney work product without sufficient information to support EPA's having withheld them. In particular, EPA withheld 88 records titled “Sitz War” that do not have any author or recipient or any identified litigation for which

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<sup>19</sup> See footnote 9.

they were prepared. Exhibit 22. EPA withheld other records asserting attorney work product among other exemptions that are addressed elsewhere in this appeal.<sup>20</sup>

**F. EPA Improperly Withheld Records Based on Deliberative Process Privilege ("DPP").**

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). The "deliberative process" privilege covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). "Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended." *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 238 (D.C. Cir. 2008) (internal citations and quotations omitted). Any non-deliberative material must be segregated and produced to the extent that the facts would not necessarily reveal the deliberative process. *See Public Citizen, Inc. v. Office of Management and Budget*, 569 F.3d 434 (D.C. Cir. 2009).

EPA withheld dozens of documents based on DPP. Exhibit 23. Among the most egregious DPP claims are:

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<sup>20</sup> See footnote 9.



-- email containing the weblink for a Saturday Night Live sketch of "Debbie Downer";

-- emails with the press or about the press; and

-- EPA communications with Congress.<sup>21</sup>

EPA should be required to produce records on Exhibit 23<sup>22</sup> as well as all other records for which EPA's DPP claim is not supported or supportable.

**G. EPA Improperly Withheld Records as Confidential Business Information ("CBI").**

FOIA Exemption 4 protects from disclosure trade secrets or, alternatively, information that is commercial or financial *and* privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974) (emphasis added); 5 U.S.C. § 552(b)(4). The terms "commercial" and "financial" are to be given their ordinary meanings. *Pub. Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *see Washington Research Project, Inc. v. Dep't of Health, Ed. & Welfare*, 504 F.2d 238, 244 (D.C. Cir. 1974) (scientist's research design is not commercial information). Commercial or financial information is "confidential" if it is "likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* (citing *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974)). If

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<sup>21</sup> EPA without any legal authority, and contrary to well-established rules against altering documents, has added to responsive records the gratuitous and inappropriate the statement "MAY CONTAIN DRAFT SCIENTIFIC DATA OR ANALYSIS" -- even to emails with Congress and other records containing no data or final data. EPA should be required to delete these references and provide unaltered records.

<sup>22</sup> See footnote 9.


the information is publicly available, courts will reject a claim of competitive harm. *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 2012 WL 4044986 (D.D.C. Sept. 14, 2012) (citing *Nat'l. Cmty. Reinvestment Coal.*, 290 F.Supp.2d at 134).

EPA failed to provide information demonstrating that records for which it claimed CBI are within that exemption. Exhibit 24.<sup>23</sup> EPA should be required to produce all records improperly withheld as CBI.

#### IV. CONCLUSION

Due to the short appeal period (over the December and New Year's holidays) Encana challenges the sufficiency of EPA's production overall and all of EPA's withholding the records on EPA's Non-Disclosure List. For the reasons stated above, EPA should be required to produce all remaining outstanding records, review its Non-Disclosure List and provide a revised, more limited version, containing only records for which EPA has legitimate and supported exemptions, and to produce all records on Exhibits 1-24 and those also requested herein.

Respectfully submitted,



Elizabeth H. Temkin

cc: Michelle Marcu

Enclosures: Exhibits 1- 24

Under separate cover: Hard drive received from Region 8 on December 3, 2012 in response to the Consolidated Requests

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<sup>23</sup> See footnote 9.